

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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Washington, D.C. 20001-8002

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DATE: February 4, 2000

CASE NO.: 1996-INA-0450

***In the Matter of:***

CARIBBEAN COFFEE COMPANY  
*Employer*

***On Behalf Of:***

AGUSTIN CRUZ  
*Alien*

Appearance: Abbe A. Kingston, Esq.  
For the Employer/Alien

Certifying Officer: Paul R. Nelson, Region IX

Before: Huddleston, Jarvis, and Neusner  
Administrative Law Judges

RICHARD E. HUDDLESTON  
Administrative Law Judge

**DECISION AND ORDER**

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,<sup>1</sup> and any written argument of the parties. 20 C.F.R. § 656.27(c).

### **Statement of the Case**

On November 1, 1993, Caribbean Coffee Company ("Employer") filed an application for labor certification to enable Agustin Cruz ("Alien") to fill the position of Maintenance Mechanic (AF 15).<sup>2</sup> The job duties for the position are:

Repair and maintain company's coffee and tea equipment, including coffee roaster, grinders, and brewers. Installs and services coffee brewers and equipment at customer's establishment.

The requirements for the position are a High School education and two years experience in the job offered.

On March 15, 1995, the EDD remanded the application to the Employer because the position included the duties of "installing and servicing brewers" which were indicative of a "Electrical-Appliance Servicer",<sup>3</sup> and thus, the employer needed to document the business

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<sup>1</sup> All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

<sup>2</sup> DOT Occupational code 638.281-014 MAINTENANCE MECHANIC (any industry) alternate titles: fixer; machine-maintenance servicer; machine overhauler; machine repairer; mechanical adjuster; repair mechanic; tool-and-machine maintainer  
Repairs and maintains, in accordance with diagrams, sketches, operation manuals, and manufacturer's specifications, machinery and mechanical equipment, such as engines, motors, pneumatic tools, conveyor systems, and production machines and equipment, using handtools, power tools, and precision-measuring and testing instruments: Observes mechanical devices in operation and listens to their sounds to locate causes of trouble. Dismantles devices to gain access to and remove defective parts, using hoists, cranes, handtools, and power tools. Examines form and texture of parts to detect imperfections. Inspects used parts to determine changes in dimensional requirements, using rules, calipers, micrometers, and other measuring instruments. Adjusts functional parts of devices and control instruments, using handtools, levels, plumb bobs, and straightedges. Repairs or replaces defective parts, using handtools and power tools. Installs special functional and structural parts in devices, using handtools. Starts devices to test their performance. Lubricates and cleans parts. May set up and operate lathe, drill press, grinder, and other metalworking tools to make and repair parts. May initiate purchase order for parts and machines. May repair electrical equipment. May be designated according to machine repaired as Carton-Forming-Machine Adjuster (any industry); Machine Adjuster (tobacco); Maintenance Mechanic, Record Processing Equipment (recording).

<sup>3</sup> DOT Occupational code 827.261-010 ELECTRICAL-APPLIANCE SERVICER (any industry) alternate titles: appliance-service representative. Installs, services, and repairs stoves, refrigerators, dishwashing machines, and other electrical household or commercial appliances, using handtools, test equipment, and following wiring diagrams and manufacturer's specifications: Connects appliance to power source and test meters, such as

necessity of this combination of duties, and of the prevailing wage (AF 26). On May 11, 1995 the Employer responded that the position was not a combination of duties as the job description under maintenance mechanic was wholly consistent with the DOT section, or in the alternative that the combination of duties was a business necessity most logically performed by one individual on site (AF 29).

The CO issued a Notice of Findings on August 8, 1995 (AF 16), proposing to deny certification on the grounds that the Alien did not possess the Employer's requirement of two years experience when initially hired, and that the Alien gained the required experience while working for the Employer from 7/91 to 6/94 in violation of 20 C.F.R. §§ 656.21(b)(5), 656.21(g) and 656.21(b)(6). The CO also found that the Employer's offer of \$12.00 per hour was below the prevailing wage determined by the local Employment office of \$18.17 per hour in violation 20 C.F.R. §§ 656.20(c)(2) and 656.40. In addition, the CO found the Employer had failed to document the business necessity of the combination of duties required to both maintain and install and services in violation of 20 C.F.R. § 656.21(b)(2)(ii). The Employer was given notice that it remedy the defects or rebut the findings by September 12, 1995.

The Employer requested an extension to rebut the Notice of Findings until October 17, 1995, which was granted on September 14, 1995 (AF 11). On October 16, 1995, the Employer requested another extension to "revise the job duties and re-test the labor market" (AF 8). On November 21, 1995, the CO responded that the Employer had not eliminated the combination of duties in its new advertisement, but had only reversed the order of the combination, and thus the second extension of time to rebut the findings was denied (AF 6).

On November 29, 1995, the CO issued a denial of certification, finding the Employer had failed to rebut the Notice of Findings within the time allotted (AF 5). On January 2, 1996, the Employer requested reconsideration or in the alternative Administrative Review, alleging that it made a timely attempt to readvertise and that it had eliminated the combination of duties (AF 2). On April 26, 1996, the CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

### **Discussion**

Section 656.25(c)(3) provides that the employer may within thirty-five calender days from the date of the NOF submit documentary evidence to cure the defects found to exist. Technical Assistance Guide No. 656 provides that upon good cause shown, a CO may grant an extension of

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wattmeter, ammeter, or voltmeter. Observes readings on meters and graphic recorders. Examines appliance during operating cycle to detect excess vibration, overheating, fluid leaks, and loose parts. Disassembles appliance and examines mechanical and electrical parts. Traces electrical circuits, following diagram, and locates shorts and grounds, using ohmmeter. Calibrates timers, thermostats, and adjusts contact points. Cleans and washes parts, using wire brush, buffer, and solvent, to remove carbon, grease, and dust. Replaces worn or defective parts, such as switches, pumps, bearings, transmissions, belts, gears, blowers, and defective wiring. Repairs and adjusts appliance motors. Reassembles appliance, adjusts pulleys, and lubricates moving parts, using handtools and lubricating equipment. May be known according to appliance repaired as Clothes-Drier Repairer (any industry); Coffee-Maker Servicer (any industry); Dishwashing-Machine Repairer (any industry); Electric-Range Servicer (any industry); Electric-Refrigerator Servicer (any industry); Washing-Machine Servicer (any industry).

time. Requests for extension should be submitted in writing prior to the expiration of the 35 days. *Barbara Friedman*, 89-INA-220 (Dec. 5, 1990).

In this case, the CO issued a detailed Notice of Findings on August 8, 1995, giving the Employer until September 12, 1995 to cure the defects. On September 8, 1995, the Employer requested an extension to rebut the Notice of Findings (AF 15), which was granted on September 14, 1995 (AF 11). Along with that request the employer submitted evidence of an independent wage survey, and a reference to a revised ETA 750 showing the Alien's past three years of experience (AF 12). However, on October 16, 1995, a day before the extension deadline was to expire, the Employer submitted a letter stating that it would readvertise and re-test the job market, and offered a revised advertisement which continued to contain the \$12.00 per hour prevailing rate, and simply changed the placement of the combination of duties (AF 8-10). The CO denied the second request for extension, as the Employer had failed to eliminate the combination of duties as instructed in the original NOF of August 8, 1995 (AF 6).

Where an employer fails to cite extenuating circumstances that require the second extension, labor certification is properly denied. *Clinical Dental*, 94-INA-481 (May 8, 1995). However, the CO may not ignore the facts and explanations offered by the employer. *Commerce Truck Stop*, 95-INA-26 (July 12, 1995). Here, the CO does not ignore the facts, as the Employer is simply offering to readvertise with the same combination of duties in a different order in the job advertisement. *Id.* Moreover, the Employer's offer to readvertise with the same combination of duties the CO found in violation does not indicate any extenuating circumstances, and would only result in a delay of the denial of certification for the identical deficiencies as the first application. *Clinical Dental, supra*; *Commercial Graphics, Inc.*, 90-INA-114 (July 15, 1991).

Based on the foregoing, we find that the Employer has failed to rebut the deficiencies noted in the NOF, specifically, the CO's challenge to the Employer's combination of duties. The CO's denial of labor certification on this issue was therefore, proper.

### **Order**

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.  
For the Panel:

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RICHARD E. HUDDLESTON  
Administrative Law Judge

**NOTICE OF PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

*Chief Docket Clerk*

***Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, N.W., Suite 400  
Washington, D.C. 20001-8002***

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

